90-756

No. _____

In The

Supreme Court of the United States

October Term, 1990

GARY McKNIGHT,

Petitioner,

v.

GENERAL MOTORS CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ROBERT J. GINGRAS, Esq.
Counsel of Record
CASEY A. NAGY, Esq.
GINGRAS & SCHAEFER, S.C.
131 South Wilson Street, #610
Madison, Wisconsin 53703
(608) 255-0061

November 12, 1990

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OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Did the circuit court below err in construing *Patterson v. McLean Credit Union* to obviate claims for discriminatory discharge pled pursuant to 42 U.S.C. 1981, thus furthering disagreement among the circuit and lower courts on *Patterson's* import in this regard, when the *Patterson* Court itself did not address this point – apparently leaving in effect that part of the Fourth Circuit's underlying opinion recognizing section 1981 discriminatory discharge claims – and post-*Patterson* decisions of this Court similarly appear to recognize the continuing colorability of such claims?

2. The *Patterson* Court observed that 42 U.S.C. 1981 would support a claim concerning racial discrimination that influenced the making of "a new and distinct relation between the employee and the employer"; in view of this observation, did the circuit court below err in holding that Petitioner's recall from an indefinite layoff by the Respondent did not reflect a "new" employment relationship when substantial evidence illustrated (1) that the recall was prompted by several discrimination complaints filed against the Respondent by the Petitioner, (2) that the Petitioner was advised by Respondent that his recall would be short-lived unless he withdrew those complaints, and (3) that Petitioner's refusal to withdraw the complaints led Respondent to engage in an escalating course of discriminatory and/or retaliatory conduct against the Petitioner that resulted in his termination?

PARTIES TO THE PROCEEDING

Petitioner is Gary McKnight. Respondent is General Motors Corporation. Petitioner is unaware of any existing parent corporation of the Respondent. Petitioner and Respondent are the parties of record in all proceedings below.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

CONSTITUTION, STATUTES AND RULES:

TABLE OF AUTHORITIES – Continued

The Petitioner Gary McKnight respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered July 2, 1990.

OPINIONS BELOW

The opinion of the court of appeals affirming in part and remanding in part Petitioner's Title VII relief, and reversing with directions to dismiss Petitioner's Section 1981 relief (App., infra., 1a), appears at 908 F.2d 104. The court of appeals' order and amended order denying Petitioner's petition for rehearing with suggestion for rehearing en banc are unreported (App., *infra.*, 42a, 43a). The decision and order of the district court affirming the jury's special verdict and denying Respondent's post-trial motions, is unreported (App., *infra.*, 30a).

JURISDICTION

The opinion and judgment of the court of appeals was filed on July 2, 1990. The order and amended order of the court of appeals denying Petitioner's petition for rehearing with suggestion for rehearing en banc were filed on August 23, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). Article III, sec. 2 of the United States Constitution provides that the judicial power vested in the Supreme Court under Article III, sec. 1 extends to "all cases, in law and equity, arising under this Constitution, the laws of the United States . . . "

STATUTES INVOLVED

The federal statutory provision primarily involved is 42 U.S.C. 1981 (App., *infra.*, 44a). Also germane to the issues raised, in view of the *Patterson* court's reasoning and the circuit court's interpretation thereof, are the following provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000(e) *et seq.*, as these provisions overlap in part the pertinent scope of relief available under 42 U.S.C. 1981; 42 U.S.C. 2000(e)-2 (App., *infra.*, 44a); 42 U.S.C. 2000(e)-3 (App., *infra.*, 49a).

STATEMENT

During the 1988-89 term, the Court pointedly addressed the relationship between 42 U.S.C. 1981 and provisions of the 1964 Civil Rights Act, 42 U.S.C. 2000(e) *et seq.*, particularly as each affords somewhat overlapping yet distinct remedies for employers' discriminatory treatment of employees. *Patterson v. McLean Credit Union*, 109 S.Ct. 2363 (1989). The instant petition concerns a significant aspect of this statutory relationship that was not expressly addressed by the *Patterson* court: whether a claim for discriminatory (and/or retaliatory) discharge is colorable under 42 U.S.C. 1981. Prior to *Patterson*, there was no question but that such a claim was colorable under 42 U.S.C. 1981. *See*, e.g., Perritt, Employee Dismissal Law and Practice (2d ed. 1987) sec. 2.8 at 61; Player, Employment Discrimination Law (1988) sec. 8.02 at 615.

Following *Patterson*, disagreement has developed among several of the circuit courts and numerous district

courts on the question of whether discriminatory (and/or retaliatory) discharge claims remain colorable under 42 U.S.C. 1981. The circuit court of appeals decision in the proceedings below furthered this disagreement.

The events culminating in the recent decision of the court of appeals are recounted below. The bases of jurisdiction in the trial court were 28 U.S.C. 1331, 28 U.S.C. 1343, 42 U.S.C. 1981, and 42 U.S.C. 2000e *et seq.* (Title VII).

1. The Petitioner, a black American, was initially hired by the Respondent as a Management Supervisor on August 14, 1978. For approximately 3½ years, he routinely received very favorable performance appraisals. Petitioner was indefinitely laid off, however, effective December 31, 1981; he filed a complaint with the Wisconsin Equal Rights Division on January 25, 1982, alleging that his layoff was due to sexual and racial discrimination by the Respondent.

2. Soon after the Respondent learned of the Petitioner's ERD complaint, it recalled the Petitioner from layoff. The Petitioner was then constantly pressured by the Respondent's managerial agents to withdraw his complaint, and threatened with the loss of his job if he failed to do so. These threats escalated when, in June 1982, the Petitioner amended his ERD complaint to account for the abuse he was receiving following his recall. On February 18, 1983 the Petitioner filed a second ERD complaint regarding the escalated discriminatory and retaliatory treatment he endured as a result of amending the original ERD complaint in June 1982. Also on February 18, 1983, Petitioner commenced a state court action against the Respondent and two of its managerial

agents on the basis of the allegations contained in the initial ERD complaint (as amended); prior to so doing, the Petitioner had received "probable cause" findings from the ERD investigator concerning the central allegations of the initial ERD complaint.

3. The Respondent's managerial agents were openly antagonistic toward the Petitioner for filing the referenced complaints. These managerial agents subjected Petitioner to extraordinary supervision, initiated an extraordinary sequence of performance evaluations, placed him in what was known to be the most troublesome area of the plant at which he was employed, warned other employees to stay away from him and/or not to cooperate with him, and at one point tried to summarily fire him in total derogation of the Respondent's established policies and procedures for personnel management. When this penultimate effort was thwarted, the managerial personnel involved arranged personnel substitutions to further their efforts to terminate the Petitioner and, the day after Petitioner's second ERD complaint received a "no probable cause" finding and several of his state court suit causes of action were dismissed, the Respondent did terminate his employment irrespective of the Respondent's obligation to allow the Petitioner the chance to complete the "Performance Improvement Plan" in which he had been enrolled. These managerial agents had, not coincidentally, remained appraised of all developments in the Petitioner's litigation even though they had no legitimate business reason for so doing.

4. Petitioner thus became the only managerial employee ever terminated by the Respondent at the facility in which he was employed. He was also the first such

employee to file a discrimination and/or retaliation complaint against the Respondent. The only other non-managerial employee of the Respondent to file such a complaint at this same facility was also terminated.

5. Following his termination, the Petitioner commenced the underlying suit in the United States District Court for the Eastern District of Wisconsin. The action was tried to a jury, which returned a verdict on October 12, 1988, in favor of the Petitioner on the questions of whether his termination resulted from racial and retaliatory motives. Petitioner was awarded $110,000.00 in compensatory damages ($55,000 for back pay and $55,000 for pain and suffering) and $500,000.00 in punitive damages. Judgment was entered on the verdict on October 14, 1988, and the Respondent's motions for post-trial relief were denied by the district court in a written decision (App., *infra.*, 30a). The trial court also denied Petitioner's request for reinstatement, for reasons also enunciated in its written decision.

6. The court of appeals affirmed the judgment of the district court to the extent it awarded the Petitioner back pay pursuant to Title VII. The court of appeals also remanded for consideration of Petitioner's entitlement to reinstatement or front pay, again pursuant to Title VII. The court of appeals reversed the judgment insofar as it awarded relief pursuant to 42 U.S.C. 1981, and ordered dismissal of all claims brought thereunder. Petitioner's awards of $55,000.00 for pain and suffering and $500,000.00 in punitive damages were thus vacated. (App., *infra.*, la).

The court of appeals majority opined that Petitioner's discharge did not infringe his right to "make" or "enforce" a contract on non-discriminatory terms, and therefore fell outside the ambit of 42 U.S.C. 1981 as analyzed by this Court in *Patterson*. The dissent objected to this interpretation of *Patterson* insofar as it barred claims for discriminatory discharge. The court of appeals also unanimously concluded that the Petitioner's recall from layoff did not constitute a "new or distinct" employment relationship, even though the recall was conditioned by racial animus and retaliatory motives, and was followed by an increasing course of employment abuse that eventuated the Petitioner's termination.

7. On July 11, 1990, Petitioner moved the court of appeals for rehearing with a suggestion for rehearing en banc. This motion was denied on August 21, 1990.

8. Pending submission of the instant petition, Petitioner moved the court of appeals for a stay of mandate. The court of appeals temporarily stayed the mandate on September 6, 1990 for a period that expired on October 4, 1990.

REASONS FOR GRANTING THE PETITION

Prior to *Patterson*, claims for wrongful discharge were clearly colorable under 42 U.S.C. 1981 wherever the discharge was alleged to have resulted from racial or retaliatory motive. Perritt, Employee Dismissal Law and Practice (2d ed. 1987) sec. 2.8 at 61; Player, Employment Discrimination Law (1988) sec. 8.02 at 615. In fact, as acknowledged by the court of appeals, the Respondent

never challenged the colorability of Petitioner's Section 1981 claims. Even in the multiple briefs submitted to this Court in *Patterson*, the Respondent there expressly conceded that Section 1981 supported any action for discharge alleged to have resulted from racially discriminatory motives.

Following *Patterson*, at least one commentator still considers discharge and retaliation cases to "almost always" fall within the ambit of Section 1981. McCarthy, Recovery of Damages for Wrongful Discharge (2d ed. 1990) sec. 5.6 at 391. Several of the courts of appeal have considered this question, however, as have numerous of the district courts, and radically opposed conclusions have resulted. This disagreement is exemplified in the pointed dissent of Judge Fairchild of the court of appeals below, directed at this very question. Plainly underlying this disagreement, which continues unresolved in view of factors to be outlined below, are the lower court's varied interpretations of this Court's reasoning in *Patterson* (and subsequent cases) regarding the scope and character of the remedies available under 42 U.S.C. 1981 relative to those available under Title VII.

The unfairness and uncertainty that inheres to the discordant interpretations of *Patterson* by the lower courts on this critical issue, of the colorability of discriminatory (and retaliatory) discharge claims under Section 1981, warrants review by this Court. Also warranting review is a secondary issue that springs not from the silence of the *Patterson* Court, as does the foregoing issue, but from the Court's suggestion that a section 1981 claim for discrimination in the "making" of a contract might extend to an event – such as a promotion – that results in a "new and

distinct" relationship between employer and employee. Given the radically different contours of Petitioner's employment relationship with the Respondent before and after his recall from layoff, and the genesis of that difference in Petitioner's pursuit of discrimination claims against the Respondent, Petitioner suggests that a "new and distinct" relationship was effected in terms proscribed by Section 1981, and that the court of appeals was overly cautious and restrictive in its interpretation of *Patterson* on this point. These two issues are examined in turn.

1. The *Patterson* Court held, in principal, that section 1981 relief is available only to persons victimized by discrimination that effects either the making of a contract or efforts to enforce rights obtained under a contract. Consequently, the Court observed that discriminatory conduct occurring in the course of a contractual relationship – but independently of the formation of the contract or efforts to enforce rights obtained under it – falls outside the ambit of Section 1981 and is more suitably remedied by Title VII and/or state contract law. 109 S.Ct. at 2372-73. The Court explained that this limitation on section 1981 resulted in the most complementary relationship to Title VII, which, while subject to some overlap with Section 1981, was more distinctly designed to remedy discriminatory practices occurring within the scope of the employment contract and thus amenable to correction by Title VII mediation and conciliation between the parties to the contract.

Significantly, the Court observed that it was sensible for Congress to create an overlap in this regard – between the conciliatory remedies of Title VII and the harsher

remedies of Section 1981 – with regard to refusals to hire for reasons of race. In this regard, the Court especially noted that where discrimination inheres to the beginning of a contractual relationship, "Title VII's mediation and conciliation procedures would be of minimal effect, for there is not yet a relation to salvage". 109 S.Ct. at 2375. Speaking more broadly, the Court also noted that an aggrieved employee would be less likely to agree to a conciliation if he or she could obtain the larger damages recoverable under Title VII. 109 S.Ct. at 2375 n.4.

For the very reasons articulated by the *Patterson* Court, as noted above, it is an equally sensible perception that Congress intended an overlap between Title VII and Section 1981 in regard to discriminatory termination of contractual relations or, in the context of employment cases, discriminatory discharge. At the instant a discriminatory discharge is effected, the aggrieved employee no longer has a relationship with the employer that is genuinely amenable to conciliation or mediation; nor, to state the obvious, is the employee unnaturally drawn to Section 1981 remedies instead of Title VII remedies, since the latter are not as well designed to compensate a discharged employee for the range of economic, emotional, and other injuries that tend to accompany the trauma of an unjust employment termination. Moreover, Section 1981 remedies are particularly appropriate to discharge cases, in that the employer who discharges an employee for discriminatory reasons should be subjected to punitive and compensatory damages – the employer has already rejected, by its actions, the very attitude encouraged through the focus of Title VII.

The logic of perceiving Section 1981 to extend to discriminatory discharge cases has been historically perceived: prior to *Patterson* such claims were broadly considered colorable, the Fourth Circuit in the lower proceedings in *Patterson* conceded them to be colorable, the Respondent in *Patterson* in the proceedings before this Court acknowledged them to be colorable, and this Court in *Patterson* gave no indication of retracting or abridging that well-established premise.

Notably in this last regard, this Court did not at all advert to a sequence of its pre-*Patterson* decisions expressly recognizing or implicitly acknowledging discriminatory discharge claims to be colorable under Section 1981. *See*, e.g., *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987); *Saint Francis College v. Al-Khazraji*, 481 U.S. 604 (1987); *Delaware State College v. Ricks*, 449 U.S. 250 (1980); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976); *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975). Given the *Patterson* Court's extended discussion concerning *Runyan v. McCrary*, 427 U.S. 160 (1976), and the manifold considerations noted to effect the overruling of established precedent, it seems very doubtful that the *Patterson* Court would have overruled *sub silentio* all of its earlier decisions recognizing or acknowledging Section 1981 discriminatory discharge claims. The doubtfulness of such a course is further suggested by the *Patterson* majority's response to points made by Mr. Justice Brennan in his partial dissent. While the majority did respond in substantial scope to a number of Justice Brennan's comments, the majority did not challenge his observation that Section 1981 still would contemplate an action for discriminatory discharge:

> The very same legislative history that supports our interpretation of Section 1981 in *Runyon* also demonstrates that the 39th Congress intended, in the employment context, to go beyond protecting the freedmen from refusals to contract for their labor and from discriminatory decisions to discharge them. 109 S.Ct. at 2388.

Regarding all of the foregoing observations, a detailed discussion appears in *Hicks v. Brown Group, Inc.*, 902 F.2d 630 (8th Cir. 1990), *reh'g and reh'g en banc denied*. *Hicks* additionally notes that virtually all circuits recognized Section 1981 claims for discriminatory discharge prior to *Patterson*. 902 F.2d at 638 n.18 (with citations).

Just as this Court's jurisprudence prior to and inclusive of *Patterson* appears to leave intact Section 1981 claims for discriminatory discharge, the Court's post-*Patterson* jurisprudence does not provide any contrary indication. Specifically, in at least two recent instances, the Court has declined to observe discharge claims to be obsolete under Section 1981 as a result of *Patterson*; the logical import of the Court's declination in this respect would be that *Patterson* simply did not address the question or abridge in any respect the existing body of precedent positively recognizing Section 1981 discriminatory discharge claims. *See Jett v. Dallas Independent School District*, 109 S.Ct. 2702 (1989); *Lytle v. Household Mfg., Inc.*, 110 S.Ct. 1331 (1990).

While this Court does not appear to have ruled in *Patterson* – or elsewhere – that Section 1981 no longer contemplates actions for discriminatory discharge, an increasing number of the lower courts have, on the basis of *Patterson*, elected to resolve this issue through interpretations of this Court's reasoning in *Patterson*. Among

the circuit courts of appeal, the Eighth Circuit has specifically declined to find that *Patterson* obviates Section 1981 discharge claims, primarily for the reasons recounted above by the Petitioner. *Hicks v. Brown Group, Inc.*, 902 F.2d 630 (8th Cir. 1990) (also citing additional cases finding *Patterson* to be silent on the question of Section 1981 discharge claims). Petitioner concedes that most courts addressing this issue subsequent to *Patterson*, however, have concluded that this Court's reasoning in *Patterson* obviates Section 1981 discharge claims. In addition to the opinion of the Seventh Circuit Court of Appeals below, the Fifth and Ninth Circuits have similarly reached this conclusion. *See*, e.g. *Lavender v. V & B Transmissions and Auto Repair*, 897 F.2d 805 (5th Cir. 1990); *Courtney v. Canyon Television and Appliance Rental, Inc.*, 899 F.2d 845 (9th Cir. 1990). Most of the district courts considering this issue have also concluded that *Patterson* signifies a departure from settled law on the question of discriminatory discharge claims under Section 1981, and that such claims are no longer colorable. *See*, e.g., *Eklof v. Bramelea Ltd.*, 733 F.Supp. 935 (E.D. Pa. 1989); *Malelcian v. Pottery Club of Aurora, Inc.*, 724 F.Supp. 1279 (D. Colo. 1989); *Johnson v. United States Elevator Corp.*, 723 F.Supp. 1344 (E.D. Mo. 1989); *Hayes v. Community General Osteopathic Hospital*, 730 F.Supp. 1333 (M.D. Pa. 1989); *Coleman v. Domino's Pizza, Inc.*, 728 F.Supp. 1528 (S.D. Ak. 1990); *White v. Federal Express Corp.*, 729 F.Supp. 1536 (E.D. Va. 1990); *Long v. A T & T Information Systems. Inc.*, 733 F.Supp. 1188 (S.D. N.Y. 1990). There is district court authority to the contrary, although it is in the minority. *See Padilla v. United Airlines, Inc.*, 716 F.Supp. 485 (D. Colo. 1989); *Birdwhistle v. Kansas Power & Light*, 723 F.Supp. 570 (D. Ka.

1989); *Booth v. Terminex Int'l.*, 722 F.Supp. 675 (D. Ka. 1989).

While it appears that the majority of the lower courts considering this issue have clearly determined that this Court in *Patterson* was inclined to reject future discriminatory discharge claims under Section 1981, the plain fact is that this Court did not so decide and has not considered the manifold issues effecting such a departure from established precedent. Moreover, for the reasons recounted earlier, it is more logical to conclude that Congress intended an overlap between Title VII and Section 1981 with respect to discharge claims given the sundering of a relationship as opposed to the type of situation envisioned by the *Patterson* Court, where Title VII conciliation and mediation remedies would be fruitful. Therefore, the Petitioner submits that the court of appeals below erred in extending *Patterson* to the point of vacating and dismissing the Petitioner's Section 1981 claims and awards obtained thereunder, and that the trend among the lower courts endorsing the position adopted by the court of appeals below dangerously perverts the scope of the relationship between Title VII and Section 1981 explained by this Court in *Patterson*. Review of this critical question is therefore warranted, and Petitioner seeks that review.

Petitioner also submits that review is warranted on the closely related question of whether Section 1981 contemplates – as it clearly did prior to *Patterson* – actions for retaliatory discharge. The lower courts appear to be divided on this question as well. *cf. Rathjen v. Litchfield*, 878 F.2d 836 (5th Cir. 1989); *Molhatra v. Cotter & Co.*, 885

F.2d 1305 (7th Cir. 1989) (Cudahy, J., concurring); *Christian v. Beacon Journal Publishing Co.*, No. 89-3822 (6th Cir., July 17, 1990), unpublished opinion available at 1990 U.S. App. LEXIS 120880.

2. The *Patterson* Court also observed that where an employee is denied a "promotion" for racially discriminatory reasons, that denial may support a Section 1981 claim. The Court's discussion does not appear to specifically require "promotion" as a predicate for such a claim, however, but rather that the employee's relationship to the employer obtain a "new and distinct" scope tantamount to the establishment of a new contract. 109 S.Ct. at 2377. As recounted earlier in the Statement, Petitioner was recalled from layoff by the Respondent and placed into a new area of the plant and subjected to immediate and continuous oppressive conduct directed toward his discrimination complaints against the Respondent. This oppressive conduct, both racial and retaliatory in character, continued unabated once the Petitioner refused to withdraw his discrimination complaints, and eventually resulted in his termination.

While the court of appeals below concluded that this sequence of events did not reflect a "new and distinct" relationship between the Petitioner and the Respondent, the court of appeals also acknowledged that "what constitutes a new employment relationship under *Patterson* is difficult and unsettled". Nonetheless, the court of appeals opined that because the Petitioner's recall did not reflect a promotion, he was in any event not entitled to bring a Section 1981 claim concerning his recall. Petitioner submits that this is an unfairly narrow reading of *Patterson*, in that there can be no question but that the entirety of

his relationship to Respondent was radically altered from the moment of his recall, and that in fact his recall appeared to be motivated by Respondent's concern over his discrimination complaints. Unquestionably, the Respondent's concern with Petitioner's discrimination complaints, and Respondents' repeated efforts to get Petitioner to withdraw those complaints, inhered to the very nature of the Respondent's relationship to the Petitioner following his recall from layoff and were certainly not characteristic of the Respondent's contractual relationship with the Petitioner prior to his filing of those complaints following his layoff. Consequently, Petitioner believes that review is warranted for further clarification of what constitutes the type of "new and distinct" relationship between an employer and employee that will predicate a Section 1981 claim, particularly where, as in this instance, a new relationship is engendered that is patently effected by discriminatory and retaliatory motives on the part of the employer in a fashion wholly distinct from previous contractual relations between the parties.

CONCLUSION

The decision of the court of appeals furthers existing disagreement among the lower courts concerning the impact on Section 1981 discharge claims of this Court's decision in *Patterson v. McLean Credit Union*, 109 S.Ct. 2363 (1989). In this regard, the decision of the court of appeals appears to extend *Patterson* unfairly beyond its own limits as well as beyond the scope of the pertinent precedent established by this Court. Additionally, the

decision of the court of appeals illustrates the need for clarification concerning what may constitute a "new and distinct" contractual relationship sufficient to fall within the ambit of Section 1981. The present petition for certiorari should therefore be granted.

Respectfully submitted,

ROBERT J. GINGRAS, ESQ.
Counsel of Record
CASEY A. NAGY, ESQ.
GINGRAS & SCHAEFER, S.C.
131 West Wilson Street, #610
Madison, Wisconsin 53703
(608) 255-0061

November 12, 1990

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 89-1379, 89-1526

GARY MCKNIGHT,

Plaintiff-Appellee, Cross-Appellant,

v.

GENERAL MOTORS CORPORATION,

Defendant-Appellant, Cross-Appellee.

ARGUED FEBRUARY 12, 1990 – DECIDED JULY 2, 1990

Before POSNER and EASTERBROOK, *Circuit Judges*, and FAIRCHILD, *Senior Circuit Judge*.

POSNER, *Circuit Judge*. Gary McKnight brought suit under 42 U.S.C. § 1981 (which dates back to the Civil Rights Act of 1866), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, claiming that General Motors fired him both because he is black and also in retaliation for his having filed claims of racial discrimination against the company. A jury returned a verdict for McKnight on the section 1981 claim, awarding him $110,000 in compensatory damages (of which half represented back pay) and $500,000 in punitive damages. On the basis of the jury's verdict, the judge entered judgment for McKnight on the

Title VII count as well but declined to order him reinstated – the only relief, besides back pay, that McKnight had requested under Title VII. General Motors appeals from the judgment against it and McKnight cross-appeals from the denial of reinstatement.

While this case was before us, the Supreme Court decided *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989), and we must decide whether, as urged by General Motors, *Patterson* wipes out McKnight's section 1981 claims. General Motors did not question the applicability of section 1981 to McKnight's claims in the district court, and the failure to urge a point in the trial court ordinarily forfeits the right to urge it on appeal. Yet the principle that judicial decisions normally are applied retroactively, and so to cases pending on appeal when the decision was made, *EEOC v. Vucitech*, 842 F.2d 936, 941 (7th Cir. 1988), was held in *Carroll v. General Accident Ins. Co.*, 891 F.2d 1174, 1175 n. 1 (5th Cir. 1990), to require the application of *Patterson* to a case – a discharge case like this – pending on appeal even though the defendant had failed to question the applicability of section 1981 in the district court. Is this holding sound?

Patterson was a racial-harassment case rather than a discharge case, and the Supreme Court affirmed the court of appeals, which had held that racial harassment was not actionable under section 1981. It was only after oral argument that the Supreme Court, in an order setting the case for reargument, 108 S. Ct. 1419 (1988) (per curiam), requested the parties to brief the question whether *Runyon v. McCrary*, 427 U.S. 160 (1976), which had held that section 1981 forbids private as well as public discrimination, and which the court of appeals in *Patterson* had not

even cited, should be overruled. In the end, the court decided not to overrule *Runyon*, but in the course of its wide ranging reexamination of section 1981 indicated (as it seems to us) that claims of racially motivated discharge are not actionable under that statute. This result could not reasonably have been anticipated before the order setting the case for reargument. ("Claims of racially discriminatory . . . firing . . . fall easily within § 1981's protection." *Patterson v. McLean Credit Union*, 805 F.2d 1143, 1145 (4th Cir. 1986), aff'd, 109 S. Ct. 2363 (1989).) A party should be allowed to take advantage of a decision rendered during the pendency of his case, even if he had not reserved the point decided, if the decision could not reasonably have been anticipated. A contrary rule would induce parties to drown the trial judge with reservations.

But the order to reargue *Patterson* was issued more than five months before the trial in the present case began. General Motors had plenty of time in which to mount a timely challenge to the applicability of section 1981, and we may assume that by doing so it would have preserved its right to rely on the peculiar and unexpected course that *Patterson* in the end took; that was to overrule *Runyon* with respect to some discriminatory conduct charged in this case. But General Motors did not question the applicability of section 1981 to this case until *Patterson* was decided, by which time the trial was over and the case was in this court.

Even if by this delay General Motors waived its right to invoke *Patterson*, a question we need not answer, McKnight cannot benefit. For while vigorously contesting the applicability of *Patterson* to the facts of his case, he has never argued that General Motors has waived its

right to rely on *Patterson*. A defense of waiver is itself waivable. McKnight waived any defense of waiver that he might have had. *United States v. Rodriguez*, 888 F.2d 519, 524 (7th Cir. 1989).

McKnight makes two claims under section 1981, and we must now consider the impact of the *Patterson* decision on each. The claims are termination on grounds of race and retaliation for filing antidiscrimination complaints.

By providing that all persons "shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens," the statute confers two distinct rights to be free from racial discrimination: a right in making contracts and a right in enforcing them. As explained in *Patterson*, the first right is violated by a "refusal to enter into a contract with someone, as well as the offer to make a contract only on discriminatory terms. But the right to make contracts does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established, including breach of the terms of the contract or imposition of discriminatory working conditions." 109 S. Ct. at 2372-73. Since the plaintiff in *Patterson* had charged not a discriminatory refusal or offer of employment but, instead, racial harassment by her employer, the court ordered the case dismissed. And so it must be with McKnight's claim of discriminatory termination: his right to make a contract was not infringed when he was fired. In so concluding, we side with the Fifth and Ninth Circuits, *Carroll v. General Accident Ins. Co., supra; Lavender v. V&B Transmissions & Auto Repair*, 897 F.2d 805 (5th Cir. 1990); *Courtney v. Canyon Television & Appliance Rental, Inc.*, 899 F.2d 845,

849 (9th Cir. 1990), and against the Eighth. *Hicks v. Brown Group, Inc.*, 902 F.2d 635 (8th Cir. 1990).

We are mindful of the argument that employment at will – the form of McKnight's employment relationship with General Motors – should be analyzed not as a single contract but as a series of fresh contracts made every day of continued employment; on this view, termination on racial grounds prevents the employee from making the next day's contract of employment, and is therefore actionable. This analysis is artificial, however, and not only because of its anomalous consequence of giving employees at will more protection under civil rights law than employees for a term have. Employment at will is not a state of nature but a continuing contractual relation. Wages, benefits, duties, working conditions, and all (but one) of the other terms are specified and a breach of any of them will give the employee a cause of action for breach of contract. *Jordan v. Duff & Phelps, Inc.*, 815 F.2d 429, 438 (7th Cir. 1987); Epstein, *In Defense of the Contract at Will* 51 U. Chi. L. Rev. 947 (1984). All that is missing is a provision that gives the contract a fixed term or that entitles one or both parties to a specified amount of notice before the other party can cancel the contract without liability. A contract for employment at will may end abruptly but it is a real and continuing contract nonetheless, not a series of contracts each a day – or a minute – long.

A second possible objection to interpreting *Patterson* as a bar to claims of discriminatory discharge is specific to this case and pivots on a transfer that McKnight received during his employment with General Motors. A

managerial employee in the accounting division of General Motors' Oak Creek, Wisconsin plant, McKnight – the jury may be taken to have found – had been laid off on account of his race, had filed an antidiscrimination complaint with Wisconsin's equal opportunity commission and later in a Wisconsin state court, and then, when GM learned of these complaints, had been recalled from layoff, pressured to drop his antidiscrimination complaints, and assigned to the manufacturing division of the Oak Creek plant to supervise a production line notorious for its problems – he was being set up for failure.

When does a transfer within a firm count as making a new contract for purposes of section 1981? The Supreme Court in *Patterson* and this court in *Malhotra v. Cotter & Co.*, 885 F.2d 1305 (7th Cir. 1989), have said that when a promotion would create a new employment contract, a racially motivated refusal to make the promotion is an interference with the plaintiff's right to make contracts free of racial prejudice, and therefore violates section 1981. Otherwise a person applying for a position from outside the company would have greater legal rights than a person already employed by the company, even if the employee worked in a division, in a job classification, and on terms of employment, unrelated to the position being applied for. Precisely how different the new employment relation must be to make a racially motivated refusal to create it actionable under section 1981 is not susceptible of a blanket answer, but we are persuaded that no new employment relation was created in this case.

To begin with, no new employment relation was created merely by virtue of McKnight's having been laid off. layoff and recall are not identical to firing and rehiring.

Although an employer cannot defeat an employee's rights against wrongful discharge by calling a forced termination "indefinite layoff," Holloway & Leech, Employment Termination: Rights and Remedies 109 (1985), ordinarily a layoff, even if indefinite, as most layoffs are, does not sever the employment relationship. Suppose you are working under a collective bargaining agreement that provides that workers shall be laid off in reverse order of seniority and recalled in order of seniority. If you are laid off and a less senior worker who had also been laid off is recalled ahead of you, you will have a cause of action for breach of contract – showing that the layoff did not cut off all your entitlements as an employee. McKnight was not covered by a collective bargaining agreement, or for that matter by any other written contract of employment. But our point is only that to be recalled after being laid off is not automatically to be given a new job. Both General Motors and McKnight still regarded him as an employee of GM after he was laid off.

A transfer between divisions of a company does not automatically create a new employment relation either. Conceivably, if the two divisions are unrelated and the employee's jobs in the divisions are significantly different, the transfer might – consistently with the functional analysis sketched above in which we compared the situations of applicants from within and from outside the company – count as the creation of a new employment relationship. This we need not decide. The alternative view is that what matters is not a change in jobs but a change in contractual status, for example from an employee to an officer or partner. *Malhotra v. Cotter & Co.*,

supra, 885 F.2d at 1317-18 (concurring opinion). But the transfer of an executive from the accounting to the manufacturing division in the same plant is not of this character. Such job changes are part of the ordinary progression of a business executive in his career with a company and it would be very odd to regard each rung on the career ladder as a different employment relation. As a matter of fact, McKnight had begun his career with GM in the manufacturing division and had been transferred to the accounting division as part of a program of rotating managerial employees through different divisions in order to give them broad experience. The turn of the rotation wheel does not create a new employment relation at each stop.

The combination of being laid off and being recalled to a job in another division – or, in other words, the existence of a period of layoff between two executive positions – does not require a different analysis. No reason is given why the whole in this instance should be greater than the sum of the parts.

But if all this is wrong – for we acknowledge that the question of what constitutes a new employment relation under *Patterson* is difficult and unsettled – McKnight still must lose on this branch of his case because he is not arguing that he failed to obtain a *promotion* that would have created a new employment relationship. He is arguing that he was transferred as part of a scheme to get rid of him. Like the plaintiff in the *Carroll* case he is arguing, in effect, constructive discharge. *Parrett v. City of Connersville*, 737 F.2d 690, 694 (7th Cir. 1984). We have just held that explicit discharges are not actionable under

section 1981. No more are constructive discharges. Section 1981 regulates the making and enforcing of contracts, but (as interpreted in *Patterson*) it does not protect the administration of contracts. Therefore it creates neither a right not to be harassed on racial grounds, as in *Patterson* itself, nor a right not to be discharged on racial grounds. We need not consider the liability of an employer who hires a minority employee and then fires him, all as part of a racially motivated scheme to exclude him from employment with the company.

We have next to consider the retroactivity of *Patterson*. We agree with *Carroll, Lavender, Courtney, and Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527, 1534 (11th Cir. 1990) (per curiam), that *Patterson* should be applied to cases such as this that had not become final before *Patterson* was decided, provided there was no effective waiver of the points established by that decision (we have held there was not here). There is no contrary precedent at the appellate level, and this is not surprising, since judicial doctrines normally are applied retroactively. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971). (The picture with regard to statutes is decidedly mixed. *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 110 S. Ct. 1570 (1990); *id.* at 1579 (concurring opinion).) There are exceptions to the rule of retroactive application of judicial doctrines, as explained in *Chevron*, but the only one that McKnight suggests might be applicable to the present case is where a party has relied to his detriment on the old doctrine. It is illustrated both by cases such as *Anton v. Lehpamer*, 787 F.2d 1141 (7th Cir. 1986), that refuse to

apply retroactively decisions shortening statutes of limitations, and by cases that refuse to allow statutes enlarging the period for bringing a suit to revive time-barred claims. *United States v. Kimberlin*, 776 F.2d 1344, 1347 (7th Cir. 1985) (dictum); *Davis v. Valley Distributing Co.*, 522 F.2d 827, 830 (9th Cir. 1975); *Carter v. Supermarkets General Corp.*, 684 F.2d 187, 191 n. 10 (1st Cir. 1982); *Herm v. Stafford*, 663 F.2d 669, 683 n. 20 (6th Cir. 1981); contra, *Friel v. Cessna Aircraft Co.*, 751 F.2d 1037 (9th Cir. 1985) (per curiam).

In this case, the former judicial doctrine – the understanding of section 1981 before the Supreme Court decided *Patterson* – enabled a civil rights plaintiff to file claims under two statutes, section 1981 and Title VII. If the plaintiff forwent suit under one of them – and is now time-barred – only to discover midway through his suit under the second statute that his claim under that statute had been wiped out by an unanticipated decision overruling a previous, and previously unchallenged, interpretation, the plaintiff would have an argument against retroactive application. We need not decide how powerful an argument. (On the one hand it can be argued that it is imprudent to forgo a possible remedy, on the other that economy in pleading should be encouraged.) This is not such a case. McKnight had two statutes to sue under, all right, section 1981 and Title VII; but he sued under both; he did not forgo the second in reliance on the first. And asked at argument how, therefore, McKnight had relied on being able to sue under section 1981 as well as under Title VII, his counsel told us that the only reliance was by him – the lawyer – not by McKnight. (His brief adds that

McKnight relied by forgoing possible state remedies parallel to section 1981, but does not spell out the nature or extent of the reliance.) He explained that had it not been for the possibility of common law damages under section 1981, he would not have considered McKnight's case worth bringing, and McKnight would have had to turn elsewhere for counsel. McKnight might not have found any lawyer willing to take his case, in which event he probably would not have sued at all. If so, then far from McKnight's reliance on section 1981 having proved detrimental to him, it enabled him to obtain the services of a lawyer who would and did press his Title VII claim as well – and successfully, too. Another possibility is that McKnight would have retained another lawyer to press the Title VII claim alone and that that lawyer would have negotiated a favorable settlement foreclosing this appeal in which General Motors is challenging the Title VII judgment as well as the judgment under section 1981. The possibilities are endless, but this only highlights the absence of grounds for confident belief that McKnight suffered a detriment by not being able to foresee the Supreme Court's decision in *Patterson*.

The next question is whether McKnight's claim of retaliation survives *Patterson*. Because section 1981 confers a right to enforce contracts as well as to make them, it punishes "efforts to impede access to the courts or obstruct nonjudicial methods of adjudicating disputes about the force of binding obligations, as well as discrimination by private entities, such as labor unions, in enforcing the terms of a contract." 109 S. Ct. at 2373. Retaliation or a threat to retaliate is a common method of deterrence, and if what is sought to be deterred is the

enforcement of a contractual right, then, we may assume, the retaliation or threat is actionable under section 1981 as interpreted in *Patterson*, provided that the retaliation had a racial motivation. *Malhotra v. Cotter & Co., supra*, 885 F.2d at 1313. If, therefore, General Motors had, because of McKnight's race, obstructed his efforts to enforce his contractual entitlements, for example by retaliating against him for bringing suit to enforce his contract of employment with General Motors, the company might be guilty of violating section 1981. *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987). We say "might" rather than "would" out of deference to the Court's strongly expressed preference in *Patterson* for interpreting section 1981 to avoid overlaps with Title VII that would enable the limitations in that statute – the requirement of exhausting administrative remedies, a short statute of limitations, limited judicial remedies (as we shall see) – to be circumvented. 109 S. Ct. at 2374-75. True, the Court cited *Goodman* with approval, but it described the holding of that case narrowly. *Id.* at 2373.

We need not pursue this question further, because General Motors did not interfere with *contractual* entitlements. As in *Sherman v. Burke Contracting, Inc., supra*, 891 F.2d at 1535, a case similar to ours in which a claim of retaliation was held not to be actionable under section 1981, the complaints that McKnight filed with the Wisconsin civil rights commission and then a Wisconsin state court were not concerned with enforcing any contractual rights he may have had against General Motors – collecting wages due, enforcing pension rights, enforcing a "just cause" provision in a collective bargaining agreement or seniority rights in such an agreement (there was no such

agreement), and so forth. The complaints were efforts to enforce his rights under antidiscrimination laws, which is a different matter because "the right to enforce contracts does not . . . extend beyond conduct by an employer which impairs an employee's ability to enforce through legal process his or her established contract rights." *Patterson v. McLean Credit Union, supra,* 109 S. Ct. at 2372.

A contractual duty may be voluntarily assumed, or imposed by law; it may be express or implied. But the rights that antidiscrimination laws such as Title VII and section 1981 and their state equivalents confer on employees are not contract rights. If they were, then state antidiscrimination laws would be preempted, in establishments covered by a collective bargaining agreement, by section 301 of the Taft-Hartley Act, 29 U.S.C. § 185 – which no one believes. The rights in question are a species of tort right. This is implicit in the Supreme Court's decision in *Goodman v. Lukens Steel Co., supra,* 482 U.S. at 662, to borrow state statutes of limitations governing claims of personal injury for use in section 1981 suits. McKnight does not claim either that his contract with General Motors contained a promise by GM not to discriminate against him on racial grounds, as the contract in *Goodman* did, 482 U.S. at 666, or that state and federal laws against discrimination in employment create an implied term, forbidding discrimination, in every contract of employment. If what McKnight is trying to argue is that public policy reads into every such contract a *contractual* duty not to discriminate on racial grounds, this would imply that every victim of racial discrimination in employment has a claim for breach of contract as

well as a claim under the statutes forbidding such discrimination. That would be extravagant; "an employer's retaliatory conduct falls under section 1981 only when the employer aims to prevent or discourage an employee (because of race) from using legal process to enforce a specific contract right." *Sherman v. Burke Contracting, Inc., supra,* 891 F.2d at 1535. Compare *Yatvin v. Madison Metropolitan School District,* 840 F.2d 412, 419-20 (7th Cir. 1988).

Since we hold that McKnight's claims under section 1981 did not survive *Patterson,* the award of compensatory damages beyond back pay ($55,000), and also of course the award of punitive damages, must be set aside. But that leaves the possibility that the award of back pay under Title VIII, which forbids both racially motivated termination and retaliation for filing an antidiscrimination claim, survives.

We first consider the significance of the district judge's failure to make explicit findings of fact and conclusions of law, as required in a bench trial by Fed. R. Civ. P. 52(a). In denying General Motors' postjudgment motions, the judge made clear his agreement with the jury's verdict, and this might seem to be enough to indicate the thrust and tenor of his decision and thus enable appellate review, the function of Rule 52(a). Against this it can be argued that, so far as the Title VII claims were concerned, the jury was at most an advisory jury, the presence of which would not excuse the district judge from his duty under Rule 52(a) to make findings of fact and conclusions of law. *Trotter v. Todd,* 719 F.2d 346, 348 (10th Cir. 1983); *Skoldberg v. Villani,* 601 F. Supp. 981 (S.D.N.6. 1985); 9 Wright & Miller, Federal Practice and Procedure § 2574, at p. 690 (1971). The jury returned a

special verdict but the findings in that verdict are far too skimpy to satisfy the requirements of the rule.

If, however, it is clear from the record and the jury's verdict what the jury must have found and therefore what the district judge, in registering agreement with the verdict, must also have found, a remand for explicit findings is not required, because it would add nothing to the information that the appellate court already has. *Mallory v. Citizens Utilities Co.*, 342 F.2d 796 (2d Cir. 1965). But beyond that and the decisive consideration here, in a dual bench-jury trial the jury's verdict binds the judge with respect to any factual issues common to the jury – and judge-tried claims. *Williamson v. Handy Button Machine Co.*, 817 F.2d 1290, 1293-94 (7th Cir. 1987); *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1421 (7th Cir. 1986); *Lincoln v. Board of Regents*, 697 F.2d 928, 934 (11th Cir. 1983); *Wade v. Orange County Sheriff's Office*, 844 F.2d 951 (2d Cir. 1988); but cf. *Yatvin v. Madison Metropolitan School District*, *supra*, 840 F.2d at 418.

This result might be questioned as an original matter; it may be worth pausing a moment to consider why. The result is sometimes described as an application of the principle of collateral estoppel, but it is not, since there is no final judgment when the judge makes his decision – just a jury verdict on which judgment has yet to be entered. And there would be no logical inconsistency in the judge's refusing to set aside the jury's verdict because he could not say that it was unreasonable, while disagreeing with the verdict and therefore entering a contrary judgment on parallel claims not triable to a jury. What is true is that the judge's findings of fact could not be used to estop or otherwise foreclose the jury in its domain, *Lytle v. Household Mfg., Inc.*, 110 S. Ct. 1331, 1335-37

(1990), because this would impair the parties' rights under the Seventh Amendment. But that is not a danger when the question is whether the jury's findings should have preclusive effect on claims to which the Seventh Amendment does not apply. *Wade v. Orange County Sheriff's Office*, 690 F. Supp. 176 (S.D.N.Y. 1987), aff'd on other grounds, 844 F.2d 951 (2d Cir. 1988).

However all this may be, the rule that makes the jury's verdict on a section 1981 claim dispositive of any common factual issues presented by the plaintiff's Title VII claim is well established in this circuit, and General Motors does not ask us to reexamine it. To the extent that the judge is therefore bound by the jury's verdict, it is pointless to require explicit findings of fact – he would just be rubber stamping the jury's verdict.

Even if the judge's findings were adequate, General Motors argues that there is insufficient evidence of racial or retaliatory motives to support those findings and the resulting judgment for McKnight under Title VII. If this is correct, General Motors' motion for judgment notwithstanding the verdict should have been granted.

There is very little evidence that McKnight was subjected to any discrimination while he was working in the accounting division, *before* he was laid off. And as to the layoff itself he argues primarily that the methods GM uses to appraise employees' performance are subjective and hence prone to bias, and in so arguing forgets that while subjective methods of appraising performance are susceptible to discriminatory application, *Watson v. Fort Worth Bank & Trust*, 108 S. Ct. 2777 (1988); *Allen v. Seidman*, 881 F.2d 375, 380-81 (7th Cir. 1989), they are not in

themselves forms or methods of discrimination. Nevertheless the company's lack of objective criteria for layoff and recalls placed it at the mercy of the jury, which was free to disbelieve the company's testimony that all the white workers retained when McKnight was laid off or recalled before he was recalled were better workers than he as determined by unbiased appraisals of performance. The company's action in recalling McKnight as soon as – and, there was evidence, because – he complained to the state agency that he was being discriminated against may have demonstrated a guilty conscience on the part of management.

Moreover, there was evidence that when McKnight was recalled and assigned to the manufacturing division, the company asked him to dismiss his state complaints, and it was when he refused that he was assigned to supervise a trouble-prone production line. This sequence supports the claim of retaliation. We discount, however, the significance of evidence that McKnight's superiors were concerned with his propensity to sue. There is nothing suspicious about such a concern in itself. A company which insists that all personnel decisions involving an employee with a demonstrated propensity to sue be carefully documented is displaying simple prudence, since a gap in the paper record would arm the employee for his next suit. The law does not seek to encourage an employee to try to obtain job tenure by filing complaints that he hopes will make him discharge-proof by giving him cause to sue for retaliation should he never be discharged. So in focusing on McKnight's complaints to the Wisconsin authorities General Motors was not necessarily

acting improperly; but the jury was not required to accept the company's version of its motivation.

McKnight's performance appraisals in the manufacturing division were poor, and that is a piece of evidence that General Motors trumpets. But he argues that the company was out to get him, and there is support in the fact that his evaluations were good when he was employed in the accounting division, although not good enough to prevent him from being laid off. It is true not only that an employee can do well in one job and badly in the next (or in the same job at a later date), but also that personnel evaluations often are careless and extravagant; but an employer cannot force a jury to discount his positive evaluations yet give full weight to his negative ones. An additional tidbit, rather excessively stressed by McKnight, is that a class action was brought on behalf of 14,000 black employees of General Motors, challenging the company's system for appraising its employees' performance as being racially discriminatory. A suit is not evidence for the truth of its allegations; there is no shortage of meritless suits. But McKnight had other evidence of discrimination and retaliation. A black employee at the Oak Creek plant testified that her superior, who was also one of McKnight's white superiors (most of his superiors were black), treated her worse than his white subordinates; and there was evidence, surprising as it may seem, that actually to discharge an employee for his supervisory inadequacies was unprecedented at the Oak Creek plant. In addition, one of McKnight's white superiors used the word "nigger" in conversation with a black employee, and while the superior may (as he testified) have been joking, the employee was offended; offense

aside, the use of the word even in jest could be evidence of racial antipathy.

The evidence was sufficient to withstand a directed verdict, and therefore to preclude our declaring the judge's findings clearly erroneous. But we have still to consider the question of trial error. All but one of the alleged errors either were not errors at all – considering the latitude that a plaintiff in a discrimination case must be allowed in order to construct a circumstantial case, *Riordan v. Kempiners*, 831 F.2d 690, 697-99 (7th Cir. 1987) – or were insignificant. But there was one error that in a case as close as this potentially was grave. That is the hourglass method employed by the district judge to limit the length of the trial. The judge decided before trial although after consultation with counsel for both parties that the case warranted 25 hours of trial time to be divided between the parties in a ratio of 13 to 12. Midway through the trial, however, he decided that 21 hours was enough and cut two from each side's allotment, but later he gave General Motors an additional half hour in response to its request for an additional hour. Time taken in making and responding to objections was counted against the party whose evidence was objected to. McKnight called a number of GM employees as adverse witnesses and GM used its cross-examination of those witnesses – which functionally was direct examination, since they were its friendly witnesses – to put in its defense. By the time the plaintiff rested, GM had only 49 minutes in which to put on its four remaining witnesses – an average of 12 minutes apiece, minus any time taken up by objections and responses thereto. It was at this point that the judge gave General Motors the extra half hour,

but 79 minutes is still a very short time for four witnesses and we were told at argument without contradiction that these witnesses *ran* to and from the stand in a desperate effort to complete their testimony before time was called.

Flaminio v. Honda Motor Co., 733 F.2d 463, 473 (7th Cir. 1984), disapproved the practice of placing rigid hour limits on a trial, while recognizing that in this age of swollen federal caseloads district judges must manage their trials with an iron hand – must scrutinize the witness list and the exhibit list with a beady eye and ruthlessly prune redundant or marginal evidence. We do not reverse district judges who do this. *Northern Indiana Public Service Co. v. Carbon County Coal Co.*, 799 F.2d 265, 269 (7th Cir. 1986). We commend them. But to impose arbitrary limitations, enforce them inflexibly, and by these means turn a federal trial into a relay race is to sacrifice too much of one good – accuracy of factual determination – to obtain another – minimization of the time and expense of litigation.

If General Motors had preserved the issue of undue curtailment of trial time, we would reverse and order a new trial. But it has not preserved it, and this time its waiver is fatal. It asked for an extra hour and was given thirty minutes, so it must show what it would have done with the other thirty minutes if it had been given them. *Id.* at 270. Neither in the district court nor in this court has General Motors attempted such a showing. The spectacle of witnesses running to and from the witness stand is unseemly, but General Motors does not argue that the spectacle was prejudicial to it. We do not reverse for harmless errors. Fed. R. Civ. P. 61. McKnight is entitled to the award of back pay that the jury gave him.

The last issue is reinstatement, which the district judge declined to order because the relationship between McKnight and GM had been poisoned by this litigation and also because the award of $500,000 in punitive damages, on top of the compensatory damages awarded, was remedy enough.

Courts of equity traditionally have refused to order specific performance of employment contracts, because it is difficult and time-consuming for a court to supervise the parties' conduct in an ongoing and possible long-term relationship of employment. *Lumley v. Wagner*, 1 DeG.M. & C. 604, 42 Eng. Rep. 687 (Ch. 1852); Farnsworth, Contracts 822, 824 (1982). By hypothesis in such a case, the employer does not want the employee back; and probably the employee does not want to be working for this employer, and hopes to be bought out. Each party will want to make life as miserable as possible for the other party while also wanting to invoke the court's aid to prevent the other party from doing the same thing to him. Courts do not want to involve themselves in the industrial equivalent of matrimonial squabbling. They do not want to be involved in the continuous supervision of a personal relationship that may last for many years. Therefore, although Title VII empowers the court to order reinstatement of an employee who succeeds in proving racial discrimination, the power is discretionary and should not be used where the result would be undue friction and controversy. The fact that after being fired by GM Mcknight entered the financial services industry where after a few years he was earning more money than he did earn or would have been earning at GM (he quit this high-paying job for reasons not disclosed in the

record) suggests that he wants to be reinstated in order to induce GM to buy him out. Mere hostility by the employer or its supervisory employees is of course no ground for denying reinstatement. *Taylor v. Teletype Corp.*, 648 F.2d 1129, 1139 (8th Cir. 1981); *Nord v. United States Steel Corp.*, 758 F.2d 1462, 1473 (11th Cir. 1985); *Donnellon v. Fruehauf Corp.*, 794 F.2d 598, 602 (11th Cir. 1986). That would arm the employer to defeat the court's remedial order. But if the employee desires reinstatement for strategic purposes, that is a valid basis for denial.

Unfortunately we cannot determine from the district judge's opinion whether he would have declined to order reinstatement for this reason. He thought that the award of punitive damages gave McKnight all the relief beyond compensatory damages that he was entitled to as a matter of equity; we have knocked out that award. The judge will have to reexamine the issue of reinstatement in light of that action and also in light of our discussion in the preceding paragraph of the circumstances in which denial of reinstatement appropriate.

Should the judge again decide not to order reinstatement, a remedial gap will open up and let us consider, finally, whether there is any way to plug it. Take first a case in which the wages and other benefits that the plaintiff would receive if reinstated would be no greater than he could obtain from an alternative and no more risky or unpleasant employment. Then reinstatement would not be necessary to eliminate the consequences of discrimination. But in a case, such as this, where substantial back pay is awarded, there is a presumption that the plaintiff does not have equally good employment opportunities, for if he did he would have been earning about

the same in whatever job he took, upon being discharged, in order to mitigate his damages. (We need not consider whether the presumption is rebutted by McKnight's unexplained departure from a lucrative position in the financial services industry.) So if in such a case reinstatement is withheld because of friction that would ensue independently of any hostility or retaliation by the employer, a remedy limited to back pay will not make the plaintiff whole.

Well, so what? Legal remedies are not always adequate, and the fact that a Title VII plaintiff is entitled only to equitable relief, 42 U.S.C. § 2000e-5(g),and not to common law remedies, *Swanson v. Elmhurst Chrysler Plymouth, Inc.*, 882 F.2d 1235, 1240 (7th Cir. 1989); *Gray v. Dane County*, 854 F.2d 179, 181 (7th Cir. 1988); *Bohen v. City of East Chicago*, 799 F.2d 1180, 1184 (7th Cir. 1986); *Hunter v. Allis-Chalmers Corp., supra*, 797 F.2d at 1421, is grounds for conjecture that, perhaps because of the influence of employers in the legislative process, Congress decided that half a loaf was better than a whole one. This is possible, of course, but the Supreme Court has said that the remedial scheme in Title VII is designed to make the plaintiff whole, *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975), and this dictum has been thought by some courts to imply that if the plaintiff's employment opportunities are inferior and reinstatement is infeasible, he should receive in addition to back pay a lump sum – called "front pay" to distinguish it from the remedy of back pay specified in the statute – representing the discounted present value of the difference between the earnings he would have received in his old employment and the earnings he can be expected to receive in his present

and future, and by hypotheses inferior, employment. *Shore v. Federal Express Corp.*, 777 F.2d 1155 (6th Cir. 1985); *Go9ss v. Exxon Office Systems Co.*, 747 F.2d 885, 890 (3d Cir. 1984); *Fadhl v. City & County of San Francisco*, 741 F.2d 1163, 1167 (9th Cir. 1984). The logic of such an award, if the purpose of Title VII's remedial scheme is indeed to make the plaintiff whole, is undeniable. *EEOC v. Pacific Press Publishing Ass'n*, 482 F. Supp. 1291, 1320-21 (N.D. Cal. 1979), aff'd, 679 F.2d 1272 (9th Cir. 1982); cf.*Lindahl v. Bartolomei*, 618 F. Supp. 981, 991-91 (N.D. Ind. 1985). But the premise can be doubted, as can the propriety, under a statute confined to equitable relief, of an award of what is realistically damages for lost future earnings – a legal rather than an equitable remedy.

This court has never addressed the question whether front pay can be awarded under Title VII. *Hunter v. Countryside Ass'n for the Handicapped, Inc.*, 710 F. Supp. 233, 237 n. 5 (N.D. Ill. 1989). Our decision holding that front pay is available in cases under the Age Discrimination in Employment Act, *McNeil v. Economics Laboratory, Inc.*, 800 F.2d 111, 118 (7th Cir. 1986); see also *Deloach v. Delchamps, Inc.*, 897 F.2d 815, 822 (5th Cir. 1990); *EEOC v. Prudential Federal Savings & Loan Ass'n*, 741 F.2d 1225, 1231-33 (10th Cir. 1984), vacated on other grounds, 469 U.S. 1154 (1985), cannot be regarded as dispositive of the issue under Title VII, since the remedial schemes of the two statutes differ markedly and the ADEA's is the more generous, by far. The present case is hardly the one in which to resolve the issue, since it has not been briefed and argued. But on remand the district court may wish to consider not only whether McKnight should be reinstated but also whether, if not, he can and should receive front

pay in lieu of reinstatement. We have suggested that he is entitled to neither remedy if reinstatement would cause undue friction and he has equally good employment opportunities elsewhere. And we have left open the question whether, if he would be entitled to front pay as a matter of first principles, Title VII authorizes the court to award it.

To recapitulate, we affirm the judgment of the district court insofar as it awards McKnight back pay under Title VII, but otherwise we reverse the judgment with directions to dismiss McKnight's section 1981 claims and we remand for reconsideration of his entitlement to reinstatement (or in lieu thereof to front pay) under Title VII. We shall make no award of costs in this court and Circuit Rule 36 shall not apply on remand.

Fairchild, *Senior Circuit Judge*, concurring in part, dissenting in part. 42 U.S.C. § 1981, guaranteeing a racially equal "right . . . to make and enforce contracts," has been interpreted as a prohibition against racial discrimination in the making and enforcement of private contracts. *Runyhon v. McCrary*, 427 U.S. 160, 168 (1976); *Patterson v. McLean Credit Union*, 109 S. Ct. 2363, 2370 (1989). "The statute prohibits, when based on race, the refusal to enter into a contract with someone, as well as the offer to make a contract only on discriminatory terms." *Patterson*, 109 S. Ct. at 2372.

I would think it reasonable and proper to interpret the statutory language, "right . . . to make . . . contracts," applied to contracts of employment, as including the

right to continue to work, in the face of racially discriminatory termination. The difficult question is whether that interpretation can and does survive *Patterson*.

Patterson's first holding dealt with the claim of racial harassment of an employee during the course of the employment, and the court did not expressly assert that a racially discriminatory termination would not be a violation of § 1981. *Patterson* reached its result as to harassment by interpreting narrowly what it is "to make" a contract of employment as Congress used those terms in § 1981.

On its facts, the holding does not reach the case before us. We must decide whether the Court has defined the right "to make" a contract in such a way that it no longer has relevance and thus is not impaired at the time the contract of employment is terminated on account of race.

There is, indeed, much language in *Patterson* focusing on the stage when an employment relationship is initially formed.

Judge Posner has adverted to the language in *Patterson*, that "the right to make contracts does not extend . . . to conduct by the employer after the contract relation has been established. . . . " 109 S. Ct. 2373. There is similar language at page 2369. It was said that the right "to make" a contract "extends only to the formation of a contract." *Id.* at 2372. Elsewhere the protection of the right to make a contract is said to cover "only conduct at the initial formation of the contract." *Id.* at 2374.

In its treatment of a claim of discriminatory denial of promotion after the beginning of employment, the Court said, "Only where the promotion rises to the level of an opportunity for a new and distinct relationship between the employee and the employer is such a claim actionable under § 1981." *Id.* at 2377 (citation omitted).

My colleagues evidently take the position that termination of a contract of employment is "conduct" in the sense the Court used that term and therefore the right "to make" a contract free of racial discrimination was fulfilled as to that employment when the employment began and is not protected by § 1981 when discriminatory termination occurs. With all respect, I do not agree that *Patterson* so held.

In the first place, the *Patterson* Court was dealing with a claim of racial harassment during the existence of the employment relationship. The Court was directly concerned with employer conduct which occurred after contract formation, but before contract termination. In this context, "conduct" as used by the Court may well not have been meant to embrace an employer's act in terminating the contract. In saying that the right to make contracts does not extend to conduct by the employer after the relation has been established, the Court referred to that conduct as "including breach of the terms of the contract or imposition of discriminatory working conditions." 109 S. Ct. at 2373. Termination of a contract at will is not breach, and no reference was made to termination or discharge as an instance of employer conduct to which the right does not extend. It is very difficult to believe that this omission was inadvertent, particularly in the light of Justice Brennan's positive assertion in dissent that

Congress intended "to go beyond protecting the freedmen from refusals to contract for their labor and from discriminatory decisions to discharge them." *Id.* at 2388 (Brennan, J., dissenting). *See Hicks v. Brown Group, Inc.*, 902 F.2d 635, 1990 U.S. App. Lexis 6069, *25-26 (8th Cir.), *reh'g and reh'g in bank denied* (1990)

In the second place, one facet of termination of employment is a refusal to enter into a contract for the future, and thus termination is a violation of § 1981 if based on race. *Patterson*, 109 S. Ct. 2372.

I am aware that the majority opinion spoke critically, at p. 2377 n.6, of Justice Stevens' assertion in dissent that an at-will employee is constantly re-making the contract and a new contract is made whenever significant new duties are assigned to the employee. *Id.* at 2396 (Stevens, J., dissenting). Fairly read, this exchange relates to activity during the existence of the employment relationship and not to termination.

I have also noted another point in the *Patterson* majority opinion where there is no reference to termination. The Court indicated reasons for avoiding overlap of coverage between § 1981 and Title VII. It concluded that "some overlap will remain." But the only instance it cited was "a refusal to enter into an employment contract on the basis of race." *Id.* at 2375 and n4. If discriminatory discharge is a violation of § 1981, it would be an important instance of overlap.

The omission would be consistent with a judgment by the Court that discriminatory discharge is not a violation of § 1981. Considering it, however, along with the omission earlier noted, it seems most probable that the

omissions indicate that the Court elected not to decide the impact of § 1981 on discriminatory discharge.

Concluding that *Patterson* leaves open the question whether a racially discriminatory termination is a violation of § 1981 and deeming it a better construction of congressional intent that it is such a violation, I respectfully dissent from the views of my colleagues on this branch of the case.

A true Copy:

Teste:

_____

Clerk of the United States
Court of Appeals for the
Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

GARY McKNIGHT,

Plaintiff,

v. Case No. 870C-0248

GENERAL MOTORS CORPORATION,

Defendant.

DECISION AND ORDER

Commencing on October 3, 1988, a jury trial was held on the plaintiff's claims, pursuant to 42 U.S.C. § 1981 and Title VII, that the defendant unlawfully discharged him from his employment at A.C. Sparkplug because of his race and in retaliation for his prior complaints of race discrimination. The jury returned a verdict in favor of the plaintiff on both the discrimination claim and the retaliation claim. The jury awarded $110,000 in compensatory damages and $500,000 in punitive damages.

The defendant has now filed motions after verdict seeking: (a) a judgment notwithstanding the verdict; or in the alternative, (b) an order amending the judgment to strike the award of punitive damages and reduce the amount of the compensatory damages; and (c) a new trial on various grounds. The plaintiff has filed a post verdict

motion to amend the judgment to provide for his reinstatement to his prior job or to a comparable position. For reasons stated herein, the defendant's several motions will be denied, as will the plaintiff's motion for reinstatement.

Motions for a judgment notwithstanding the verdict are to be weighed by the following legal standard:

> Such a motion should be denied "where the evidence, along with inferences to be reasonably drawn therefrom, when viewed in the light most favorable to the party opposing such motion, is such that reasonable men in a fair and impartial exercise of their judgment may reach different conclusions." *Smith v. J.C. Penny Company*, 7 Cir., 1958, 261 F.2d 218, 219.

Rakovich v. Wade, No. 85-1529 and 85-1530, slip op. at 12 (7th Cir. June 8, 1988) (en banc) (quoting Valdes v. Karoll's Inc., 277 F.2d 637, 638 (7th Cir. 1960).

In deciding whether the evidence is sufficient to satisfy this standard, the district court is not to weigh the evidence or judge the credibility of the witnesses nor substitute its own judgment of the facts for that of the jury. *Rakovich, supra,* at 12-13. The district court, however, should consider whether the evidence to support the verdict is substantial; "a mere scintilla of evidence will not suffice." La Montagne v. American Convenience Products, Inc., 750 F. 2d 1405, 1410 (7th Cir. 1984).

I find that there was ample credible evidence to support the jury's findings that the defendant discriminated against the plaintiff on the basis of race, and also, that it retaliated against him for having filed complaints

alleging race discrimination. Similarly, there was sufficient evidence to warrant the jury's finding that the defendant took these actions in a malicious, wanton or oppressive manner.

The order of proof in a case such as this is set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), and in Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1980). Under the prescribed model of proof, the plaintiff must first establish a prima facie case. To do this the plaintiff must (1) prove that he is a member of a protected class, (2) prove that he was discharged, and (3) produce sufficient evidence of disparate treatment that the court can infer a causal connection between his protected class membership and the discharge. Similarly, in order to establish a prima facie case of retaliation, the plaintiff must show that: "(1) he has engaged in statutorily protected activity; (2) that the employer has taken adverse employment action; and (3) a causal connection exists between the two." Donnellon v. Fruehauf Corp., 794 F.2d 598, 600 (11th Cir. 1986).

The prima facie case serves the function of eliminating the most common non-discriminatory reasons for the employer's adverse action against the plaintiff, giving rise to a legally mandatory presumption of intent to discriminate on a prohibited basis. *Burdine, supra,* 450 U.S. at 254 n. 7. The burden then shifts to the employer to rebut the presumption by articulating a legitimate, non-discriminatory reason for the discharge. *Id.* The burden then shifts back to the plaintiff to prove that the articulated reason is pretextual. This may be accomplished directly by persuading the trier of fact "that a discriminatory reason more likely motivated the employer or

indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine, supra,* 450 U.S. at 256. If the articulated reason is shown to be pretextual, then the initial presumption is in effect resurrected and stands unrebutted.

In *McDonnell Douglas,* the Supreme Court held that in an individual race discrimination case, the employee may focus on employment patterns broader than his own individual case to prove pretext. *Id.* at 804-05. An employer's deviation from normal patterns and practices, the subjectivity of the employment evaluation system relied upon by the employer and the racial attitudes of the supervisors in question are generally considered relevant in this regard. *Id.*; Hunter v. Allis-Chalmers Corp., 797 F.2d 1417, 1423 (7th Cir. 1986).

In *Burdine* the Supreme Court recognized the significance of credibility judgments by the trier of fact by noting that "there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation" and that "this evidence and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual." *Id.* at 255 n. 10. Whether the proffered non-discriminatory reason is pretextual may turn on the jury's judgment as to the credibility of the witnesses "because almost every worker has some deficiency on which the employer can plausibly blame the worker's troubles." *Hunter, supra,* 797 F.2d at 1423.

The defendant argues that Mr. McKnight was fired because he did not meet the employer's legitimate job

performance expectations. G.M. presented the testimony of numerous management personnel who held supervisory responsibilities over the plaintiff, along with the results of various personnel appraisals that evaluated the plaintiff in a negative manner. G.M. argues that the volume of this evidence was "overwhelming" and that Mr. McKnight did not provide a scintilla of evidence to prove that the allegations of employment performance deficiencies were pretextual. On the contrary, I find that the jury was presented with substantial evidence, which, if believed, would show that the defendant's proffered explanation of poor job performance was pretextual.

First, the jury received the testimony of the plaintiff's expert on personnel practices. Dr. Dresang opined that the subjectivity of G.M.'s employee appraisal system is such that is does not provide reliable evidence of poor performance. Second, the motives of a number of the defendant's witnesses who had supervisory responsibility for the plaintiff were effectively impeached. Some examples: one of the plaintiff's supervisors told racial jokes, using the word "nigger;" one of the plaintiff's supervisors was coerced into reducing an evaluation of Mr. McKnight's work performance; a former manufacturing superintendent provided an affidavit to the effect that the plaintiff's immediate supervisor wanted to terminate the plaintiff's employment for reasons unrelated to his job performance; and several black employees testified that they were concerned about how black employees were treated by Mr. McKnight's immediate supervisor. Third, assuming the validity of the defendant's negative appraisal of the plaintiff's job performance, there was

evidence that the plaintiff was treated differently than others with similar performance problems.

Substantial evidence was offered by Mr. McKnight in support of his claim of retaliation. For example, Thomas Cassini admitted that the plaintiff's past litigation against the company was discussed in the meeting at which it was decided to fire the plaintiff; the plaintiff's immediate supervisor was told that he "must" document everything about the plaintiff because of the pending litigation; Mr. McKnight was referred to by a supervisor as a "hot potato" because of his litigation; there was evidence that supervisory personnel were upset with the plaintiff because he had filed complaints against the company; there was evidence that the plaintiff's assignment to "line 6" was retaliatory and designed to pave the way for his termination; and there was evidence that a supervisor repeatedly asked Mr. McKnight to sign a release for his complaint against the company and that this supervisor told him that his career at G.M. would be damaged if he did not sign.

The foregoing examples, along with other similar evidence offered at trial, are sufficient when viewed in the light most favorable to the plaintiff to have enabled the jury to reach the conclusion that the explanation offered by the defendant was pretextual. The findings of fact of the jury will not be disturbed.

The defendant's motion for a new trial is based on the following grounds: (a) that the jury's verdict is contrary to the great weight of the evidence; (b) that the defendant was denied a fair trial because of erroneous evidentiary rulings, the imposition of time constraints by

the court, and alleged misconduct by the plaintiff's counsel; and (c) that the size of the damage award evinces bias and passion on the part of the jury which necessarily must have infected its determinations as to liability.

The authority to grant a new trial generally rests within the trial court's discretion. Allied Chemical Corp. v. Daiflon, Inc. 449 U.S. 33, 36 (1980). A new trial is warranted if the verdict is contrary to the clear weight of the evidence, if the damages award is excessive, or if the trial was not fair to the moving party. General Roam Fabricators, Inc. v. Tenneco Chemicals, Inc., 695 F.2d 281, 288 (7th Cir. 1982).

The defendant's allegations of misconduct by the plaintiff's attorney are singularly unfounded and merit no discussion.

The defendant lists fifteen evidentiary rulings by the court which it asserts were in error. The defendant wanted the court to limit the evidence to that which concerned the motives of only those management personnel directly involved in evaluating or supervising the plaintiff during the relevant time period. Such an evidentiary limitation is directly contrary to the approach reflected in *McDonnell Douglas* and would impose insurmountable evidentiary barriers on plaintiffs in this type of case. *See Hunter, supra,* 797 F.2d at 1423. I do not believe that the evidentiary rulings in this case prejudiced the defendant or justify a new trial.

The defendant argues that it was not given adequate time to present its case. At the pretrial conference both sides agreed that the trial would take no more than a week, and the court scheduled the case accordingly.

Although this was not a complex case, it was tried with great zeal and competitiveness, and as the trial progressed it became very apparent that the presentation of proof was becoming unnecessarily prolonged. The allowable time provided to each side was then modified to accomplish the completion of the trial within the period originally contemplated; however, counsel were expressly informed that additional time would be afforded if the interests of justice required it. Indeed, at G.M.'s request its allowable time was in fact extended near the end of the trial. G.M. never made an offer of proof as to what evidence it was unable to introduce and failed to make an objection as to the time allocations. Johnson v. Ashby, 808 F.2d 676, 678 (8th Cir. 1987). In my opinion, G.M. was afforded a full and adequate opportunity to present its case, and my exercise of control over the length of the trial did not impinge on the defendants receiving a fair trial.

The jury's award of $55,000 for lost wages and fringe benefits was reasonable. The plaintiff earned wages of $32,000 for the eleven months that he worked for the defendant in 1983. After his discharge, Mr. McKnight earned $12,600 in 1984; $18,000 in 1985; $33,000 in 1986; $55,000 in 1987; and approximately $11,000 in 1988, up until the commencement of the trial. Accounting for lost benefits, projected salary increases and expenses incurred in commuting to Chicago in 1987, the $55,000 award was reasonable.

The jury's award of $55,000 for pain, suffering, and physical and emotional distress was also reasonable. A jury's assessment of damages for intangible harms such

as humiliation and emotional distress is inherently subjective. I believe that the jury's judgment was amply supported by the evidence. The expert testimony of Dr. Lynch showed that the plaintiff suffered anxiety, sleep disorder, headaches and other psychosomatic complaints associated with stress, along with a loss of self-esteem as a result of his termination. The plaintiff was under such stress that just prior to his discharge, he sought psychiatric counseling. Dr. Lynch also testified that the plaintiff suffered a greater degree of emotional distress as a result of his termination than did the typical victim of unjust termination; this was because of the degree of investment that the plaintiff had made in terms of time and commitment to the defendant. Under these circumstances, an award of $55,000 is consistent with past awards for emotional distress in race discrimination cases under § 1981. *eg*. Foster v. MCI Telecommunications Corp., 555 F.Supp. 330 (D.C. Colo. 1983) ($50,000); Fisher v. Dillard University, 499 F.Supp. 525 (E.D. La. 1980) ($50,000); Williams v. Owens-Illinois, Inc., 25 F.E.P. Cases 1478 (N.D. Cal. 1979) ($50,000).

In my opinion, the jury's award of $500,000 for punitive damages is also reasonable. This is a case involving deliberate wrong doing by a wealthy defendant. There as ample evidence to enable the jury to conclude that G.M. intentionally retaliated against the plaintiff. An award of punitive damages is appropriate to punish a wrongdoer for its outrageous conduct and to deter others from engaging in similar conduct. Ramsey v. American Air Filter Co., 772 F.2d 1303, 1314 (7th Cir. 1985).

In order for an award to constitute meaningful punishment, the jury is permitted to take into account the

size and wealth of the defendant. Simply because the amount necessary to constitute punishment and deterrence is sizable does not mean that the award of punitive damages is a windfall for the plaintiff. In the instant case, the award of punitive damages is not out of proportion to the amount of compensatory damages. It cannot be said that the amount of the award evidences that the jury was motivated by improper reasons, such as prejudice or caprice.

In his motion for reinstatement, Mr. McKnight argues that prevailing Title VII claimants are presumptively entitled to reinstatement. Donnellonn v. Fruehauf, 794 F.2d 598 (11th Cir. 1986). The remedial purposes of the act contemplate that, in order to make the plaintiff whole, reinstatement may be granted. Albemarle Paper Co. v. Moody, 422 U.S. 405, 416 (1974). In that case the Supreme Court explained:

> It is true that backpay is not an automatic or mandatory remedy; like all other remedies under the Act, it is one which the courts "may" invoke. The scheme implicitly recognizes that there may be cases calling for one remedy but not another, and – owing to the structure of the federal judiciary – these choices are, of course, left in the first instance to the district courts.

Although the district court's discretion is equitable in nature, its judgment must be guided by the purposes of Title VII. *Id.* The purposes of Title VII are prophylactic:

> [the purpose is] to achieve equality of employment opportunities and to remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. [quoting Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971)] . . . It is also the

> purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination. This is shown by the very fact that Congress took care to arm the courts with full equitable powers. For it is the historic purpose of equity to "secur[e] complete justice."

Albemarle, supra, at 417-18.

After balancing all the equities, I am convinced that reinstatement in this case would not advance the purposes of Title VII. The plaintiff asserts that he prefers not to be reinstated in his former position of manufacturing supervisor but rather in a position concerned with corporate finance or investment banking. Further, the evidence at trial established that the plaintiff has changed his career goal from manufacturing management to being a stockbroker. I conclude that the plaintiff does not have a primary interest in the position that he formerly held. At trial it became evident that the relationship between the parties is acrimonious at best and given the management level position involved, reinstatement would probably be unproductive. It is clear that in the instant case the plaintiff has been fully compensated and thereby made whole by the award of compensatory damages, and the defendant has been properly punished by the award of punitive damages. Complete justice requires no more in the context of the remedial purpose of Title VII.

Therefore, IT IS ORDERED that the defendant's motions after verdict be and hereby are denied.

IT IS ALSO ORDERED that the plaintiff's motion for reinstatement be and hereby is denied.

Dated at Milwaukee, Wisconsin this ___ day of January, 1989.

Senior U.S. District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

August 21, 1990

Before

Hon. Richard A. Posner, Circuit Judge

Hon. Frank H. Easterbrook, Circuit Judge

Hon. Thomas E. Fairchild, Senior Circuit Judge

GARY MCKNIGHT, *Plaintiff-Appellee, Cross-Appellant,*	)	Appeal from the United States District Court for the Eastern District of Wisconsin.
Nos. 89-1379, 89-1526 v.	)	
GENERAL MOTORS CORPORATION, *Defendant-Appellant, Cross-Appellee.*	)	No. 87 C0248 Myron L. Gordon, *Judge.*

ORDER

On July 13, 1990, plaintiff-appellee, cross-appellant filed a petition for rehearing with suggestion for rehearing en banc. All of the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the suggestion for rehearing en banc. The petition is therefore DENIED.

APPENDIX D

AMENDED

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

August 21, 1990

Before

Hon. Richard A. Posner, Circuit Judge

Hon. Frank H. Easterbrook, Circuit Judge

Hon. Thomas E. Fairchild, Senior Circuit Judge

GARY MCKNIGHT, *Plaintiff-Appellee, Cross-Appellant,*	)	Appeal from the United States District Court for the Eastern District of Wisconsin.
Nos. 89-1379, 89-1526 v.	)	
GENERAL MOTORS CORPORATION, *Defendant-Appellant, Cross-Appellee.*	)	No. 87 C0248 Myron L. Gordon, *Judge.*

ORDER

On July 13, 1990, plaintiff-appellee, cross-appellant filed a petition for rehearing with suggestion for rehearing en banc. All of the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the suggestion for rehearing en banc.* The petition is therefore DENIED.

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* Circuit Judge Walter J. Cummings did not participate in the consideration of the suggestion for rehearing en banc.

APPENDIX E

Applicable Federal Statutes

42 U.S.C. 1981

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

Sec. 2000e-2. Unlawful employment practices

Employer Practices

(a) Is shall be unlawful employment practice for an employer –

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Employment agency practices

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer to employment any individual on the basis of his race, color, religion, sex, or national origin.

Labor organization practices

(c) It shall be an unlawful employment practice for a labor organization –

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment

practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

Members of Communist Party or Communist-action or Communist-front organizations

(f) As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of

the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

National security

(g) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if –

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment

practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

Business or enterprises extending preferential treatment to Indiana

(i) Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

Preferential treatment not to be granted on account of existing number or percentage imbalance.

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency,

labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area. Pub.L. 88-352, Title VII, sec. 703, July 2, 1964, 78 Stat. 255; Pub.L. 92-261, sec. 8(a),(b),Mar.24,1972, 86 Stat. 109.

Sec. 2000e-3. Other unlawful employment practices

Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has

opposed any practice made an unlawful employment practice by this subchapter, or because he had made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Printing or publication of notices or advertisements indicating prohibited preference, limitations, specification, or discrimination; occupational qualifications exception

(b) It shall be an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, or relating to admission to, or employment in any program established to provide apprenticeship or other training by such a joint labor-management committee, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment. Pub.L. 88-352, Title VII, sec. 704, July 2, 1964, 78 Stat. 257; Pub.L. 92-261, sec. 8(c),Mar.24,1972, 86 Stat. 109.